18640

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1903.
No. 200.

A. CHESEBROUGH et al., Owners and Claimants of the Ship "Iroquois,"
Petitioners,

vs.

MATTHEW BRIDGES.

BRIEF ON BEHALF OF PETITIONERS.

STATEMENT OF THE CASE.

This is an action *in rem* brought in the District Court of the United States for the Northern District of California against the American ship "Iroquois" to recover damages for the alleged negligence of the master of the vessel in not deviating from the course of the voyage and proceeding to some port, other

than that of the ultimate destination of the vessel, for the purpose of procuring surgical aid for a seaman who had been accidentally injured on the voyage. The District Court having, on the 18th day of February, 1902, entered a decree in favor of the libelant in the sum of three thousand dollars and costs and interest from the date of the decree, the claimants of the vessel, petitioners in this court, appealed to the United States Circuit Court of Appeals, and that court having, on the 6th day of October, 1902, affirmed the decree of the District Court, the claimants petitioned this court for a writ of *certiorari,* which was granted on the 28th day of February, 1903; to this writ due return was made on the 16th day of March, 1903, and the cause is now before this court to be heard on the record and proceedings of said Circuit Court of Appeals.

The ship "Iroquois," of 1997 registered tons, laden with a valuable cargo consisting of about 2900 tons of general merchandise, sailed, on the 27th day of December, 1899, from the port of New York bound to the port of San Francisco. On the 23d of February, 1900, the ship, when in latitude 56° 57′ south and longitude 67° 36′ west,—a little to the southward and westward of Cape Horn,—encountered a gale; and the libelant, when engaged in furling the mainsail, accidentally and without fault on his part, or of that of anyone, fell from the main yard to the deck, the fall resulting in a simple fracture, below the knee, of both bones of his right leg, and also the fracture of two of his ribs. From

this last named injury he had, however, perfectly recovered, when, on the 7th day of May, 1900, he arrived at San Francisco where the voyage ended. The next day, May 8th, he was paid off, and his connection with the ship, as one of the crew, terminated. (Trans., pp. 21, 22, 35, 36, 37, 68.)

The fractured bones of the leg, as well as the fractured ribs, were set by the master of the ship, assisted by others of the ship's company. (Trans., p. 37.)

The subsequent treatment of the libelant's injuries by the master; the care and attention which he bestowed upon him up to the time of the arrival of the ship at San Francisco; and other circumstances, which may be deemed to be material, as tending to show that the master, in omitting to deviate, as it is claimed that he should have done, to procure surgical assistance for the libelant, acted not negligently, but in the exercise of sound judgment and discretion and in perfectly good faith, will be noticed hereinafter.

On the 14th of May, six days after the arrival of the ship, the libelant, in consequence of the condition of his leg, entered the Marine Hospital at San Francisco, where, on or about the 16th of October following,—five months after he entered therein,—the leg was amputated.

It is alleged in the libel that the master of the ship could, immediately after the accident and with small loss of time, have proceeded with the libelant to Port Stanley on the East Falkland Island, or to Valparaiso,

or to some one of several other ports in the southern part of South America, where surgical aid could have been obtained for him, and the subsequent loss of his leg by amputation would thereby have been averted; and that the omission of the master to proceed to some one of these ports constituted such negligence on his part as to render the vessel liable in damages to the libelant. (Trans., pp. 6, 7. Libel, Art. V and VII.)

The claimants in their answer, denied, among other things, that the vessel could have proceeded to any one of the ports mentioned in the libel with small loss of time; and also denied that the master, in omitting to proceed to any one of said ports with the libelant, was guilty of any negligence whatever. (Trans., pp. 13, 14. Ans., Art. V, VII.)

The claimants then, by proper averments, stated the facts and circumstances relating to the setting of the broken bones; the subsequent care and attention which were bestowed upon the injured seaman, and that, so far as the master could ascertain, there was nothing to indicate that the bones of his leg were not in the process of healing, and nothing to indicate that there was any necessity to proceed with the libelant to an intermediate port, even if it could have been easily and conveniently done, but which, had it been done, would necessarily have lengthened the voyage to a considerable extent both as to time and distance. The issue thus raised, and on which the cause was tried in the District Court, was whether or not, under the circumstances of the case, it

was the duty of the master to bear away to Port Stanley in the East Falkland Island, distant about 480 miles, or to some one of the more distant ports in the southern part of South America, and whether or not, in omitting to do so, he was guilty of such culpable negligence as to render the ship, and, consequently, her owners, liable in damages. (Trans., pp. 15, 16, 17. Ans., Art. X.)

The District Court found that it was the duty of the master to have proceeded with the libelant to some intermediate port, and that his omission to do so constituted such negligence as to entitle the libelant to damages, and assessed the same in the sum of three thousand dollars, for which a final decree was entered. From this decree the claimants appealed to the Circuit Court of Appeals, and assigned errors as follows:—

1. That the Court erred in finding and deciding that under the circumstances of the case as disclosed by the evidence, it was the absolute duty of the master of the ship to deviate from the course of the voyage for the purpose of procuring surgical aid for the libelant.

2. That the Court erred in finding that, under the circumstances of the case as disclosed by the evidence, the master of said ship "Iroquois" was guilty of negligence in not departing from the course of the voyage of said ship and proceeding with the said libelant to some port other than the port of final destination of said ship, for the purpose of procuring surgical aid for the said libelant.

3. That the Court erred in finding that under the

facts of the case as disclosed by the evidence, the libelant was entitled to a decree against the said ship "Iroquois," or the claimants thereof, in the sum of three thousand dollars.

4. That the Court erred in finding that the libelant was, under the circumstances of the case as disclosed by the evidence, entitled to recover against said ship, or the claimants thereof, any damages whatsoever. (Trans., Assignment of Errors, pp. 119, 120.)

SPECIFICATION OF ERRORS.

The first and second of the foregoing assignments of error were those relied upon. The third and fourth assignments of error, being general in their nature and but little, if anything, more than conclusions drawn from the first two, were not considered separately.

The Appellate Court affirmed the judgment of the District Court and found, as appears from its opinion—for neither in that court nor in the District Court were made any specific findings of fact—that

"From the evidence and the law applicable thereto, " it was the duty of the master to bear away to some port " of distress as *soon as possible* after the occurrence of " the accident. There were several ports to which the " appellee might have been taken for surgical treat- " ment. The vessel could have returned to *Port Stan-* " *ley,* the chief port on East Falkland Island. * * * " There were other ports accessible without rounding " the Horn to which the appellee could have been taken

" in time to procure treatment to *save his leg*. The ship " could have made *Evangelist Island* by sailing one or " two days out of her course. From that island it seems " the appellee could have been taken by steamer to " Valparaiso. The "Iroquois" herself could have made " the port of *Valparaiso* with a loss of probably not " more than *four or five days in her voyage*. He might " have reached the port of *Ancud or San Carlos with* " *about the same loss of time* * * * where surgi- " cal treatment could have been had. When, on the " 30th of March, the splints were removed, the ship " was as near to San Francisco as to Valparaiso, and " there was no recourse except to proceed on her voy- " age. It is *no excuse* that the master was ignorant, or " *that he believed the broken leg was healing properly,* " and *for that reason thought it unnecessary to bear* " *away from his course.*" (Opinion, Tr., p. 128.)

This decision your petitioners believe, as pointed out in their petition, to be erroneous in this:

1. That it was not under the circumstances disclosed by the evidence, the absolute duty of the master of the "Iroquois" to deviate from the course of the voyage for the purpose of procuring surgical aid for the libelant.

2. That the master was not, in view of the facts disclosed by the evidence, guilty of negligence in not deviating from the course of the voyage for the purpose of seeking surgical aid for the libelant.

a. That it deprives the master of the exercise of any discretion whatever in the premises.

b. That it requires the master to *at once* deviate and

seek surgical aid for a seaman at some port in *every case* where any bone is broken, no matter how simple the fracture may be, or if he fails to do so, the owners must be held liable as insurers of the entire recovery of the seaman.

POINTS AND AUTHORITIES.

That, whenever a seaman falls sick or is injured in the service of the ship, he is entitled to be taken care of, and, so far as may be, cured at the expense of the ship owner, was declared by the ancient laws of the sea; and this rule may be traced with remarkable uniformity through the marine laws and ordinances of all maritime states, ancient as well as modern. It is incident to, and forms a part of, his contract as a material ingredient in the compensation for his services as a seaman.

Osceola, 189 U. S. 150, 175.

The obligation of the master to the seaman in this respect is an obligation wholly independent of their relation as fellow servants in navigating the ship. It is the ordinary maritime obligation to provide for a seaman's cure of hurts while in the service of the ship.

Brown, J., in *The "Scotland,"* 42 F. 925, 927.

It does not, however, appear from the ancient laws of the sea that, for the purpose of procuring aid for a sick or disabled seaman, the master was required to deviate from the course of the voyage; but that the sea-

man was to be set on shore for such treatment only when it was convenient to do so, or the ship was in port.

"If it happens that sickness doth seize on any of the "mariners while in the service of the ship, the master "ought to set him on shore, and to let him have candle- "light, and provide him a lodging, and also to spare "him one of the ship's boys, or hire a woman to attend "him; likewise to afford him such a diet as is usual in "a ship. * * * And if the *vessel be ready for her* "*departure he ought not to stay for said sick party.*" (Laws of Oleron, Arts. VI and VII.) "If a seaman "falls ill of any disease *and it is convenient to put him* "*ashore,* he shall be fed as if he was aboard and have "some one to look after him there." (Laws of Wisby, Art. XIX.

While the seaman is to be cured, so far as may be at the expense of the ship, of sickness or injury sustained in its service, he is not to receive any compensation or allowance for the effects of the injury. But so far, and so far only as expenses are incurred in the cure, whether they are of a medical, or other nature, for diet, lodging, nursing, or other assistance, they are a charge on, and to be borne by the ship. The sickness or other injury may occasion a temporary or permanent disability; but that is not a ground for indemnity from the owners.

"They are liable only for expenses necessarily in- "curred for the cure; and when the cure is completed, "at least so far as the *ordinary* medical means extend, "the owners are freed from all further liability. They "are not in any just sense liable for consequential dam- "ages. The question, then, in all such cases is, what

"expenses have been virtually incurred for the cure; "not what might, under other circumstances, be in- "curred. The owner is not to respond for charity act- "ually administered by others, but for expenses. He is "not to pay what may remunerate the sufferer for his "losses, or what in compassion or humanity he might "demand; but what the law has measured out as the "limit of justice."

Story, J., in *Reed* v. *Canfield,* 1 Sum. 202, 203.

This we believe to be a correct general statement of the law relating to the duty of the shipmaster, and the liability of the ship-owner in respect to the care of sick and injured seamen. It must, however, be taken with the qualification that the effects of the injury have not been materially aggravated by the culpable negligence of the master; as it seems to be settled law, that if, through such negligence, the consequences of the injury are rendered more serious in respect to prolonged suffering and ultimate recovery, or if such recovery be materially retarded or rendered impossible, the ship-owner would then be liable in consequential damages to the seaman.

"Beyond this I find no authority in the ancient or "modern codes, in the recognized text-books, or the "decisions on maritime law, for the allowance of con- "sequential damages resulting from wounds or hurts "received on board ship, whether arising from ordi- "nary negligence of the seaman himself, or of others of "the ship's company."

Per Brown, J., in the *"City of Alexandria,"* 17 Fed. R. 395.

The view of the lower courts seems to be that the master has an absolute duty to deviate from his course in order to procure medical and surgical aid in all cases where a member of the ship's company has fallen ill or has been injured. The effect of such a doctrine would be that, no matter what the nature of the illness or injury may be, whether severe or slight, no matter where the ship may be sailing at the time of the injury, or how far she may have to deviate; no matter what the dangers might be to which, in consequence of such deviation, ship, crew, and cargo may be exposed, or what the effect may be on existing insurance of ship and cargo; or what claims for damages may arise which the cargo owner might enforce against the shipowner; the ship would be liable to the seaman for not bearing away for the nearest port at which aid and relief might possibly be obtained. Under such a doctrine there would be no room for the exercise of judgment and discretion on the part of the master regarding the necessity of the departure of the ship from her regular course.

We do not understand this to be the law regulating the duty of the master. We claim that his duty is dependent upon the circumstances surrounding him at the time of the accident, and that he must determine his action in the light of these circumstances and in the exercise of a reasonable discretion.

Cases may arise where, guided by reasonable discretion, he would be bound to deviate for the purpose of

securing medical or surgical aid for a member of his crew. Where a man of intelligence sufficient to command a ship would perceive that, in the absence of competent professional aid, an injury to a seaman will probably terminate in death or result in a grievous and permanent disability, and that a port of distress may be reached in season to afford to the afflicted seaman the necessary medical or surgical relief, the omission to sail for the port of distress would render the ship liable for any aggravation of the disease or injury.

On the other hand there are cases in which a prudent and competent master, in the exercise of a wise discretion and carefully weighing the conflicting interests which all the circumstances of the case present, would come to the conclusion that the situation offers no features which imperatively demand a deviation from his course—a measure which, *prima facie,* exposes his ship and cargo to danger and liability. The exercise of an honest and fair discretion should protect him and his ship against claims for damages resulting from situations in which many of the conflicting duties which he owes to the various interests in his keeping compete for the shaping of his final judgment.

Besides the duty which the master owes to the seamen in respect to their treatment in cases of illness or injury, he ownes a duty to the ship-owner and cargo owner not to deviate from the course of the voyage marked out between the port of departure and that of destination; for, if he does that, except involuntarily, and under the

pressure of an imperious necessity, it operates, from that moment, to discharge the underwriter on the ship and cargo from liability under his contract of insurance, and the cargo owner, whether *insured or uninsured,* would have a cause of action against the ship-owner for any damage to the cargo subsequent to such deviation.

We shall endeavor to show that, in the present case, neither the nature of the injury nor the circumstances attending it pointed to any danger to the life or to any permanent disability of, the libelant.

We concede that the decision of the master, in a given case, cannot be conclusive as to what constitutes a proper discharge of his duty, as the circumstances may be such as to make it apparent that it was a decision which a man of sound discretion and judgment, uninfluenced by selfish motives, and acting in complete fidelity to all his duties, could not have reached. It is then for the court to determine as to whether or not, in view of all the circumstances as then presented to the master, he acted in good faith; and whether his decision in respect to the necessity of bearing away to some accessible port of distress was or was not that of a reasonable, prudent, and humane man having in view the welfare of the libelant and the duty which he owed to him as one of the crew of the ship, consistently with the duty which he owed to the ship and cargo. If it were, then the omission to do so does not constitute such negligence as to render the ship liable in damages.

In support of these views we refer to *Peterson* v. *The Chandos,* 4 Fed. 645. In this case the ship was bound

from New York to Portland, Oregon. On the 10th of June, when in latitude 38° south, longitude 98° west, —2° 25′ farther to the westward than the "Iroquois" was when in the same latitude on the 11th day of March,—Peterson fell from aloft, which resulted in the breaking of his thigh bone and otherwise injuring him. The contention there, as well as here, was that the ship should have gone to Valparaiso. The presiding judge, Deady, in commenting on the case of *Brown* v. *Overton,* 1 Sprague, 462, which was the only case cited on this question, said:

> "While it proves it is the duty of the master to
> " seek surgical aid for a wounded seaman while
> " there is any chance of its being useful, yet it by
> " no means follows that it is his duty to do so at
> " any sacrifice or risk to the vessel or voyage.
> " There must be some limit to the obligation to
> " seek aid outside of the vessel. A fall from aloft
> " is an incident of a seafaring life, and the law can
> " scarcely be that in such a case surgical aid must
> " be sought to the serious hindrance or delay of the
> " voyage and the liability of the cargo to depreciation in the port of destination, or the delay or
> " loss to some important enterprise undertaken
> " upon the faith of its due delivery."

The essential circumstances of the case at bar seem to be almost identical with those in "The Chandos": The voyage off the South American coast seems to have been the same; the deviation—to the same port, Valparaiso—would have been nearly the same; and in both cases seventy-three days elapsed between the day of the accident and the day of the arrival at the port of des-

tination. In "The Chandos," although the injuries suffered by the seaman were more severe than those of the present libelant and apparently demanding a greater sacrifice on the part of the ship, the Court held that, in view of the time and risk likely to be consumed and incurred, the master was not bound to make the departure.

In *Danvir* v. *Morse,* 139 Mass. 323, under circumstances similar to those of the case at bar, the plaintiff contended that it was the duty of the master, immediately after the accident, to sail to the nearest port where surgical aid could be given, and there to land him; but this instruction was refused, and the jury were instructed,

> "That such was not the law, and that other cir-
> "cumstances were to be regarded besides the com-
> "fort and well-being of this one person on board
> "the ship; that there was no absolute duty upon
> "the master to seek the nearest port; that *his duty*
> "*was to be ascertained upon consideration of the*
> "*circumstances bearing on the case, and he is to*
> "*decide that matter, in the exercise of a sound*
> "*judgment and discretion, taking into account all*
> "*the circumstances which are to govern his ac-*
> "*tions*"; also "that *the burden was upon the plain-*
> "*tiff to show that the master's decision was not*
> "*reasonable and proper at the time and under the*
> "*circumstances.*" (P. 324.)

In other words, the instructions pointed out that all for which the plaintiff was entitled to recover was for the *aggravation to his original injury, if any, which proceeded from the negligence of the defendants.*

These instructions were sustained by the Appellate Court, which said:

> "It was for the jury to consider the condition of "the plaintiff, the situation of the master, the ease "with which he might reach another port, the "probability of finding medical attendance, and "all other circumstances, and to determine "whether the plaintiff had sustained the burden "of showing that the decision of the master was "otherwise than reasonable and proper." (P. 325.)

In the case of *Olsen* v. *Whitney*, 47 C. C. A. 331, the master of a schooner on which the libelant was third mate, and who accidentally suffered a fracture of his leg in two places, was held guilty of negligence in not deviating from his course to a place about 500 miles distant, which he could have reached in four or five days, and where surgical aid for the libelant could have been procured, the latter having requested the master to do so. The court said, "The principal "controversy as to the facts arises between the testimony "of the master and the appellee concerning the latter's "request to be taken to the nearest port." The court said in the course of its opinion, "For the purpose of this "opinion it will be admitted that the rule requiring the "master of a vessel to go into the nearest port in order "to give the injured seaman treatment is not an impera-"tive one; that, in the nature of things, there must be "some limit to the obligation of the ship to seek aid "outside of the vessel. It depends upon the facts and "circumstances of each particular case. If Olsen had

" agreed with the master to go to Alaska, he could not " complain of the master's failure to go to Port Town- " send. In the Chandos case it was held that it could " not be assumed from the evidence that the port of " Valparaiso could have been made in less than two " weeks, and the court was of the opinion that the ves- " sel was not under obligation to make that sacrifice of " time and risk of cargo for the libelant. It would " have taken only four or five days to reach Port Town- " send. There was no cargo on board; no danger of " loss or damage on that account. The wind was fair " and favorable. There was no peril to the ship."

We take no exception to that statement of the law, but how can that statement, which necessarily concedes some discretion to the master, be reconciled with the imperative language of the same court in this case, " that it was the duty of the master to bear away to some " port of distress as *soon as possible* after the occurrence " of the accident." This, too, when the master, so far as appears, was competent and *did know* how to set the fractured bones. The fractured ribs did heal, and there is no reliable testimony that the bones of the leg were not properly set, but only that they did not unite. Nor did they unite after the respondent had been put under the care of the skillful surgeons of the marine hospital at San Francisco, even after the operation of resection had probably been performed, for Dr. White, in answer to the question whether it appeared " that he (the re- " spondent) had been properly treated at the hospital,"

replied, " As I say, I only saw the superficial wound in " his leg. I presumed he had been operated on as " shown by the history of the case." (p. 74.) "I under- " stood he was operated on for the relief of an ununited " fracture of his leg." (p. 75.)

That fractured bones, even when properly set, do not always unite, appears from the testimony of Dr. White (p. 78) that non-union may arise from a variety of causes; *inter alia,* "the interposition of soft parts, such " as tendons, muscles, blood clots, and foreign bodies." Now, it is quite evident that a surgeon, when setting bones in a case like the present, could not know whether some of these obstacles to the union of the bones were or were not interposed; so that, by whomsoever set, the bones might not from any one of those causes have united.

The questions, then, to be presented for the consideration of the Court are: 1. Was any aggravation of the libelant's injury or the subsequent loss of his leg the proximate result of *culpable negligence* on the part of the master? 2. Did his decision to proceed on the voyage, without deviating, under a just view of all the facts and circumstances, as developed by the testimony, constitute such negligence?

To determine these questions the attention of the Court is now respectfully invited to the testimony bearing upon them.

ARGUMENT.

The nature of the libelant's injury was not of a character to create alarm, in the mind of the master, as being dangerous to life or likely to result in any permanent disability. It was a simple fracture of both bones of the leg below the knee, one of these bones being so near the muscular surface that it would seem to have been easy for the master, or any person of ordinary intelligence, to have discovered the nature of the fracture, and that the ends of the fractured bones could easily be brought into apposition. The first duty of the master was to give immediate aid to the wounded seaman, and, if possible, to reduce the fracture. This the master proceeded to do; and, as he believed—and there is no proof that this belief was not, either at that time, or at any time during the voyage, well founded—brought the ends of the bones into juxtaposition. "I "bathed the leg with hot water, and set it, and put the "splints on. * * * I bandaged it tight." (P. 37.*) This is a usual method employed to keep broken bones in position after they have been set. The libelant was then placed in his bunk, and his leg kept in a slightly elevated position by putting under it a box covered with pillows. (P. 38.) "I always instructed him to "keep his leg up, elevated on that stand. I impressed "it on his mind." (P. 63.)

---

*Note.—These numerals, and all succeeding ones, refer to the pages of the printed Transcript of the Record, unless otherwise noted.

After the libelant was placed in his bunk in the forecastle, which, as appears from the master's testimony—and nothing appears to the contrary—was dry, warm, and well ventilated (p. 50), the steward was instructed to give him gruel, mush, and other light food; "that " was given him about a month, * * * and there " were other things from the cabin table which were " given to him as well, that were cooked for the cabin " and given to him." (Pp. 38, 39.) * * * "I think " I must have given him that diet until after I took the " splints off, to the best of my memory. I think I gave " it to him off and on pretty nearly all the way, differ- " ent things." (P. 44.)

In answer to the inquiry whether the libelant made any request of him for different kinds of food he replied: "I don't think he made any request of me at all. " I don't remember his making any request at all for " any other kinds of food. He seemed to be satisfied " with what he got. I remember giving the steward a " can of milk every four or five days to make his gruel " with; condensed milk which we used for that pur- " pose, together with corn starch and things like that. " That was given to the steward, and my instructions " were to give it to that man." (P. 44.)

When the master did not himself dress the libelant's leg, he ordered the steward to do it. "I gave the stew- " ard directions to dress his leg, to wash it with warm " water and dress it with vaseline, and from there on " and up to the last." (P. 51.)

Q. Did he make any complaint that he was not being attended to? "No, sir; he made no complaint. He "seemed to be contented, when I asked him if he felt "all right and was satisfied. He said that he was; he "was perfectly contented; that he was getting every-"thing he wanted." (Pp. 52, 66.)

Now, of the captain's testimony respecting his treatment of the libelant, and of the satisfaction of the latter with it, there is not one statement, except the trivial matter of the salts, that is contradicted or qualified by the libelant.

Whenever the master deemed it necessary—and, for the purpose of ascertaining when it was necessary, he seems to have kept a careful watch over the man—he administered salts. (Pp. 38, 43.)

The libelant, however, testifies that he never received, in a single instance, anything except the regular forecastle food. (Pp. 28, 32.) As opposed to this testimony is not only the testimony of the master giving details as to the kind of food furnished him, but the probability arising from the humane treatment of him by the master from the time he was injured until he arrived at San Francisco, and also the entry in the official log-book, a copy of which appears on pages 41 and 42 of the transcript, which, before the end of the voyage was signed by the libelant: "I set the leg, ban-"daged the side, and administered salts and regulated "his diet." On cross examination (p. 58) the captain explains what he meant by "regulated his diet."

After he was put in the forecastle the captain visited him every two or three days from that on. "I asked him " every time I went in there how he was getting on; if " he had everything he wanted. He said he was getting " along all right. He seemed to be contented; that he " had everything he could wish." (Pp. 42, 52.)

The libelant having stated, on his cross-examination, that he sent to the captain for vaseline and salts, and did not get either, then admits that it was only on two occasions that he did not get the salts, but he always got the vaseline. (Pp. 33, 34.) Why he did not get salts as well as vaseline, if it be true that he sent for them, can be explained only by the conjecture that his request was not made known to the master. But this is an immaterial matter except as it may bear upon the veracity of the latter. The captain, in answer to a question whether he furnished him with everything he requested, answered that he did, and everything he asked for he got. He was then asked whether the libelant sent for salts on one or two occasions and did not get them. He answered: "He got everything he sent for. In fact, " he did not need to send for anything, because I went " to the forecastle and asked if he wanted anything. " When he wanted anything he got it. He did not need " to ask for salts. I asked him if his bowels were work- " ing and everything like that, to see if he was in proper " condition. When he said they were not working, I " gave him salts. *I considered it my place to attend to* " *that. He did not need to ask for anything like that.*

"*He was not given occasion to.*" (P. 43.) This testimony is not denied by the libelant except in the instances noticed above.

On the 30th of March, thirty-six days after the occurrence of the accident (p. 62), the ship then in longitude 109° west, and latitude 7° 50′ south, (see Chart, Claimant's Exhibit 2), and about 1,790 marine miles west from the coast of South America, the bandages and splints were removed by the master from the libelant's leg for the purpose of examining it, this being the earliest time after the accident that he thought it safe to do so. "I did not think it safe to take the bandages "off (before). I had to give the leg time to knit." (Pp. 42, 62.) If taken off before, he feared that the bones would separate. (P. 42.) I "found that the leg "was improving and seemed to be in pretty good con- "dition with the exception of some sores and blotches "on the leg. I thought it might be on account of the "blood settling there, like blood vessels, or blood blis- "ters, rather. * * * I washed the leg with warm "water, and a little carbolic acid in to purify it, and "dressed it with vaseline. * * * For about three "weeks I dressed it pretty near from one to two days, "* * * by taking the bandages off, washing the leg "and rubbing it with liniment; that is, where there "were no sores, and where there were sores, I dressed "it with vaseline." (Pp. 43, 62.) "His leg was as "straight as could be when I took them (the splints) "off." "Q. There was a union?" A. "Yes, sir. I felt "the leg right up and down." (Pp. 62, 63.)

In respect to the blood blisters on the leg, they do not appear to have been of a serious or unusual nature; nor, when the bandages and splints were removed, was there anything in the appearance of the leg that indicated, so far as the master could discover, that it had not been properly set. The libelant, however, testifies that his leg was loose; it had not knitted, and that it worked back and forth when the splints were off. "Q. Was that so anybody could see it? A. Yes, sir." (P. 26.)

Now, if this were true, it is surprising that not only the libelant did not call the attention of the master to it, for the "working backward and forward" of two broken bones must have been attended with such pain and suffering, that it is difficult to believe he would, not have done so, but still more surprising that the latter did not see it when he examined the leg for the purpose of ascertaining its condition, for, as the libelant said, "anybody " could see it."

It sufficiently appears from the testimony of the master that the libelant was, in every respect, treated by him with consideration and kindness, and there is nothing in the testimony of the libelant to indicate anything to the contrary. This view was entertained by the district judge: "The libelant was treated with kindness by " the master at all times after the accident, and had all " the care that it was possible for one in his situation to " receive on board of a vessel at sea, when unattended " by anyone possessing surgical knowledge and skill." (Opinion, p. 110.) This treatment is to be taken into

18652

consideration as material to the question whether the master acted toward the libelant in good faith, and testified truly when he said that he could have shaped a course for Valparaiso, but did not do so because the libelant was apparently "entirely getting along all right. "I thought the leg would be all right when we got here. "* * * I did not think it necessary to put away. I "did not see any need of it. I did not think he could "get any better treatment than I could give him myself "at the time"; and that he was of opinion that the leg was getting along all right and knitting successfully. (P. 50.)

The places where he could have been landed:—

1. Among other places the Appellate Court held that "*the vessel could have returned to Port Stanley, the "chief port on the East Falkland Island.*"

This we understand to mean that it was his duty to do so.

From and including the 23d of February up to the 1st of March, the ship had made about 360 miles to the northward and westward from the point where the accident happened. During all of this time there was nothing to indicate that the libelant was not getting along all right; he thought that he was, and so did the master. No special circumstances connected with his injury were developed to indicate that, for the purpose of securing surgical aid, it was necessary or advisable to put the ship about and proceed to Port Stanley, distant

about 480 miles, on a direct course, to the northward and eastward of Cape Horn.

Captain Thompson testified that at the season of the year when the accident occurred the weather was changeable from fine weather to heavy gales from the westward; that in sailing from Port Stanley to Cape Horn the prevailing winds were head winds; that he had been around Cape Horn sixteen times as master and seaman. When asked whether or not he was able, as a seaman, to form any judgment as to the length of time it would have taken for him to have gone to Port Stanley and get back to the place where he laid his course for Port Stanley, replied, "That is pretty hard " to tell. It is kind of difficult to make a passage, that " is, to get from there around Cape Horn. There are " generally westerly winds, and it is pretty hard to beat " in that weather. The chances are it would have taken " three or four weeks to make that distance. * * * " We know what weather to expect there." That he might have reached there, from the point of the accident, in three or four days; that the wind was fair for him to have gone there. (Pp. 45, 46.)

The learned judge of the District Court, referring to the length of time it would have taken to have gone there, said: "The testimony of the master of the 'Iro- " 'quois,' which, I think, should be accepted upon this " point, was to the effect that it probably would have " taken from three to four weeks to have gone to Port " Stanley and returned to the place of the accident, be-

"cause in returning the vessel would have had to beat "against a head wind." (Opinion, Trans., p. 109.)

The Appellate Court, however, said: "We think this "more than a liberal allowance for probable delay and "adverse winds." (P. 128.)

Counsel for the respondent, in their brief in opposition to the petition for the writ of *certiorari,* endeavored to show that the ship could have gone to Port Stanley in the Atlantic Ocean and returned to the point in the Pacific Ocean where the accident happened, in less than nine days after the event, by assuming that from the 23d of February to the 4th of March the winds which prevailed from Cape Horn to Port Stanley on the Atlantic Ocean were, in respect to direction and force, precisely the same as those that prevailed during the same period of time on the Pacific Ocean between the place of the accident, in longitude 87° 30′ west, latitude 50° 30′ south, the position of the ship at 12 M. on the 4th of March. And that the vessel, in going to and returning from Port Stanley, would cover the same distance in miles that she covered between those days when on her course from the place of the accident toward San Francisco. The bare statement of such a proposition, founded, as it is, on mere conjecture, is sufficient to expose its fallacy.

It is not alone the loss of time that is to be taken into account in judging of the conduct of the master in not proceeding with the respondent to the Falkland Islands. The danger to ship and cargo in making such a devia-

tion is to be considered. The weather off Cape Horn and in that vicinity even during the months of February and March is always more or less stormy. As at any hour heavy, dangerous gales were likely to arise, it must, therefore, have been an extreme necessity, clearly apparent, which would have justified the master of the ship to have exposed it and its cargo to such dangers by twice going around Cape Horn, as he must have done in going to the Falkland Islands and returning to the point on his course from whence he had deviated.

2. *"The ship could have made Evangelist Island by "sailing one or two days out of her course. From that "island it seems the appellee could have been taken by "steamer to Valparaiso."* (Opinion, Trans., p. 128.)

It appears from the testimony of Carrescio (p. 98) that there was a lighthouse there; that "if a *passing* "*vessel* makes a sign, the lighthouse will send a boat"; that if a man is landed there, he might be taken by some such vessel to "Valparaiso, or to Sandy Point" in the Straits of Magellan, 180 miles to the eastward of the entrance, on the Pacific Coast, to those straits. (See Chart, Claimant's Exhibit 2.)

While it is true that the master could have deviated from his course and probably reached the Evangelistas in latitude 52° 24′ 30″ south, longitude 75° 24′ 15″ west (see Claimant's Exhibit 2), with a loss of time not exceeding two days, because on the 2d of March he was within 180 miles of these islets, yet if the master thought of landing the respondent at that place, and had con-

sulted the "Directory for Navigation of the South Pa-
" cific Ocean," a standard work by Alexander George Findley, and which, presumably, he possessed, he would have gained the following information: "Los Evangel-
" istas, consisting of four rocky islets and some detached
" rocks and breakers * * * are very rocky and
" barren, and suited only to afford a resting place or
" breeding haunt for seals and oceanic birds, but a land-
" ing place may be found on one of them" * * * (p. 45), with "a lighthouse on the southernmost one" of them. (Addenda to 2d ed., p. 7.) Certainly not a very promising place in which to leave an injured seaman who needed care and attention.

But if landed at this lighthouse, who was to take care of him while waiting there to try the doubtful experiment of getting passage on some passing steamer to Sandy Point in the Straits of Magellan, or to Ancud de San Carlos, or to Valparaiso? Certainly the captain could not have followed the suggestion of the laws of Oleron and "hired a woman to take care of him," or, for that purpose, "spared him one of the ship's boys," a seaman, without, perhaps, rendering his ship short-handed, and, in this respect, unseaworthy. If he could have left one of the crew, then the latter must have volunteered to remain, because the master had no power or authority to "force him on shore" for that purpose, or to "leave him behind" against his will and consent. Then, how was he to make his wants known unless the captain furnished an interpreter, for it may be well

enough assumed that neither he nor the seaman, if any, left with him could speak the Spanish language, the language of the country. The chance of getting a passing steamer to take him on board at the lighthouse and convey him to some port where surgical aid could have been obtained is exceedingly doubtful. The master of a passing steamer would most likely refuse to take a wounded and comparatively helpless man on board of his vessel, or, if he did, then, perhaps, only at a large price, for the payment of which, the amount being unknown, it would have been impossible for the master to have made provision. Under such circumstances, to have landed the man at this place, assuming that it could have been done, would have been inexcusable. For such an experiment or purpose the master would have no right to have left him there. The seaman is bound to the ship, and the ship is bound to the seaman; and he is not to be separated from it except under circumstances of stringent necessity.

If, by chance, he could have obtained a passage either to Sandy Point or to Ancud, at neither of which places, so far as appears, was there an American or other consul,—and the probabilities are that there were none,—then who was to make arrangements for medical or other attendance for him, or for nursing, care, and sustenance? Evidently, no one; so that if, under such circumstances, he had been carried to either of these places, it might have been said, verily, "the last state " of this man is worse than the first."

3. *"The 'Iroquois' herself could have made the port "of Valparaiso with a loss probably not more than four "or five days on her voyage."* (Opinion, Trans., p. 128.)

As to the length of time that it would have taken the ship to have reached Valparaiso, Captain Thompson testified, "It is very hard to tell. I might have got to "Valparaiso in a month. Maybe inside of a month. "I could not have shaped my course for Valparaiso "until I got around the Horn * * * from say "about 80° west longitude and 50° south." That as to the length of time that it would have taken him to have reached Valparaiso provided he had taken the best course that he could, "It is pretty hard to figure on. I do "not know. The nearest I came to Valparaiso at any "time was six hundred miles." (Pp. 46, 47, 48.) Had the ship been in longitude 80° west, latitude 50° south where she could have first laid a course for that port (p. 47), and sailed on a direct line for it in longitude 71° 37′ 23″ west, latitude 33° 1′ 53″ south, the distance to that port would have been about 1,085 miles; but as the ship could not have sailed on a direct course to that port unless she had a fair and constant wind, it is impossible to calculate what distance the ship would have had to sail in order to reach it, nor, consequently, the time occupied in reaching it, because this must necessarily be in great part based on mere conjecture as to what the force and direction of the wind would be, especially when nearing the South American Coast.

Counsel for respondent in their brief, filed in opposition to the granting of the writ, have attempted to show that the vessel could have deviated to Ancud de San Carlos or to Valparaiso, and returned to the course from which she deviated with a loss of time not exceeding four or five days. To arrive at this result they have conjectured, or rather contend that the master should have conjectured, that when in latitude 55° south, longitude 75° west, he would have the same winds, in respect to direction and force, that he thereafter did have, and that he should have further conjectured that these winds, as to direction and force, would extend to and along the South American coast, at least six hundred miles to the eastward of his course, and that after he had arrived at one or the other of these ports, as the case might be, the same winds would, in all respects, prevail, and so continue until he had again reached the course from which he had deviated. To illustrate this proposition they have transposed from a copy of the master's charts (Claimant's Exhibits 2 and 3) the profile of the course, on which he sailed toward the equator, to a point one hundred miles distant from and along the coast of South America to Ancud and to Valparaiso. (See Libelant's Exhibits 4 and 5.) Argument is not needed to show the fallacy of this proposition. It was apparent to Mr. Corracio, who made the drawing on Libelant's Exhibits 4 and 5, for when asked at what rate he calculated the speed of the vessel to have been, he answered, "I supposed,

"going near the land, touching at Ancud or touching "at Valparaiso; I supposed he had just the same condi- "tions. *That may not be true.* It may be favorable to "us, or not favorable to us. I supposed we had the "same conditions. The wind was fair for us." (P. 104.)

Now we have devoted more time to this subject than would, perhaps, have been necessary had it not been, as it seems to us, quite apparent that the Appellate Court adopted this theory of counsel for the respondent; otherwise we do not see how it could have reached the conclusion that the vessel "could have reached the "port of Valparaiso with a loss of not more than four "or five days on her voyage," and would have reached the port of Ancud "with about the same loss of time," this port being 540 miles to the southward of Valparaiso. Except this, we cannot discover anything in the testimony that would justify such a conclusion. On the contrary Mr. Corracio says that from latitude 55° south, longitude 75° west,—the position of the vessel on the first of March—the ordinary passage of a sailing vessel would be to Valparaiso fourteen or fifteen days, and to Ancud seven or eight days. (Pp. 95, 96.)

In this connection we think that what was said by Judge Deady in the case of the "Chandos," 6 Sawyer, 550, is pertinent.

It is claimed "that it was the duty of the master un- "der the circumstances to have gone into the nearest "port, Valparaiso, where it is admitted that proper "surgical aid and appliances could have been obtained. "Upon the evidence it is very uncertain what time it

" would have taken to reach Valparaiso from the place " where the accident occurred—a distance of eighteen " degrees east and five degrees north. Counsel for the " libelant argues that it might have been done in eleven " days, but the calculation upon which this conclusion " is based assumes that the vessel might have changed " her course from about northwest to east and made " about four miles an hour to Valparaiso.

"Now there is no evidence in the case as to the force " or direction of the wind between the locality of the " accident and the latter place, and we are therefore " left almost to conjecture as to the time that would " have been consumed in making the detour. The bur- " den of proof is upon the libelant to support his alle- " gation that the master failed to do his duty towards " him in this respect. If it had been shown that the " vessel could, under the circumstances, make about ten " miles an hour, and thereby have made Valparaiso in " a little more than five or six days, it might have been " proper for the master to have gone in there; indeed, I " think it would have been his duty to do so. But as it " is, I do not think it would be safe to assume that this " port could have been made in less than two weeks, and " I do not think that the vessel was under obligation to " make that sacrifice of time and risk of cargo for the " libelant."

The cases, *Scharff* v. *Metcalf,* 107 N. Y. 215; *Olsen* v. *The "Scotland,"* 42 Fed. R. 925; *The City of Carlisle,* 39 Fed. R. 807; *Brown* v. *Overton,* 1 Spr. 462, we respectfully submit, are not authorities for the decree in this case.

In *Scharff* v. *Metcalf* the vessel was bound from New

York to Sagua La Grande. On the voyage a seaman received an injury which culminated in an aneurism of the popliteal artery. On reaching the Cuban port a physician who was consulted informed the captain that a surgical operation and not medicine was needed for the cure, and recommended the removal of the seaman to a hospital, or, at least, to obtain some suitable place on shore with provisions usual in such cases for his support on shore; that it was dangerous to carry him back to New York without an operation, if a delay exceeding twelve days was to be incurred; the master refused this request and kept him on board until the homeward voyage was begun and ended, and more than twenty days after the doctor's warning of the dangerous condition of the wounded man landed him in New York, placed him in a hospital where amputation became necessary because of the long delay and the destructive progress of the disease. Under the foregoing facts it is clear that the master violated his duty. He had been apprised of the dangerous nature of the injury by the doctor, the necessity of a surgical operation, the danger of delay in performing it, and the facilities for performing it without in any manner delaying the business of the voyage. These facts brought the case directly within the scope of the modern, and the letter of the ancient, sea laws.

Olsen v. *The "Scotland"*: The libelant had shipped as an able seaman at the port of Antwerp, where the vessel then was, and while mounting a ladder to get

on board with a bag of clothes on his back, lost his balance, fell into the water, and dislocated his shoulder. He complained to the master that his shoulder was out of joint and gave him great pain. He was answered roughly, and no further attention was given to him. Afterwards, when the vessel stopped for two days at Flushing, and again, subsequently, at the Downs, where the vessel was detained two weeks, he requested to be put on shore for treatment. The captain made no examination of his arm until three or four days after he got to sea, and then declared it to be an old wound for which he could do nothing. On arrival at New York two months afterwards he went to a hospital where the operation of resection was performed, and the arm put in place. The court held that the master was fully notified of the injury, and that it was his duty to have given the libelant such treatment as the circumstances offered, and there was abundant opportunity for this both at Flushing and at the Downs. The omission to do this was negligence, for which the ship was liable.

City of Carlisle, 39 Fed. R. 807, 814: The libelant, a lad of about sixteen years of age, serving as an apprentice on board the vessel, and bound from Liverpool to Portland, Oregon. When the ship was at a point in the Atlantic Ocean about 332 miles to the eastward of Rio de Janeiro, the libelant was struck on the head by a clue iron, which "fractured and depressed his "skull, from the effect of which he fell on the deck."

The conduct of the master of the ship toward the libelant and his wilful neglect of him after the accident, as appears from the opinion of the court, was atrocious, and seems to have been actuated by malice *in fact.* In referring to the question of the duty of the master to have deviated to Rio de Janeiro, the court said, "On "the question of going to Rio de Janeiro for surgical aid "for the libelant, I do not feel warranted from the state "of the evidence as to the wind in holding that it was "the absolute duty of the master to make the deviation, "although I am much inclined to think he might prop- "erly have done so." Later on the master might have gone into Montevideo or the Falkland Islands without going one hundred miles out of his way.

Brown v. *Overton,* 1 Sprague, 462: In this case both the legs of the seaman were broken below the knee. The bones were not properly set, one being helplessly twisted out of shape, which the master, if he took any proper care of the man, must have known. The master intended to make the Island of St. Helena for the purpose of correcting his longitude, and did pass within forty miles of it, and could then have reached it in eight or ten hours. If he had shaped his course for that port, he could have reached it, consulted with the American consul there, and obtained surgical aid and advice, with only a few hours' detention; but he decided not to go there, and assigned as a reason for not doing so that it would have occasioned expense.

In no one of those cases were the broken bones properly set and kept in place, as, we submit, was done in this case. In no one of those cases was it declared to be the duty of the master to *at once* seek a port of distress when the seaman was injured. In no one of them was the exercise of reasonable discretion denied to the master.

Finally, the decision in the case at bar is far reaching in its effect and application. The rule requiring the master of a ship, *as soon as possible,* after a seaman has sustained some corporal injury, to deviate from the course of the voyage to some port or place where surgical aid can be procured for him, although the master may, under the circumstances, believe it to be unnecessary to do so, is equally applicable to injuries other than of broken bones. Accidents at sea to seamen are as common as the storms and tempests that usually cause them, and though they may not result in broken bones, yet other injuries, such as cuts and contusions, not apparently severe, may, if not properly cared for, result in blood-poisoning, which is usually fatal, or in some other serious consequences. It is also applicable in case of disease, whether pronounced in its type or in its incipient stages, of the symptoms of which the master may be ignorant, and which he may be more incompetent to treat successfully than the reduction of a simple fracture or dislocation. Besides, suppose there is a succession of accidents—not an improbable supposition—of a nature similar to that in the present case, then it

would be his absolute duty in each case, as it occurred, to bear away to some port or place to procure surgical aid. Thus the voyage would be indefinitely prolonged and danger to the ship, crew, and cargo correspondingly increased.

We respectfully submit that the master of a ship who, "from time immemorial, * * * is expected to act "as physician and nurse, according to his ability, in "cases of sickness or accident," is, in a case like the present, not imperatively bound to deviate from the course of the voyage, but is entitled to use his own judgment, as to the necessity of doing so, to the same extent as in other emergencies which may arise in the course of the voyage, and that if after a careful and intelligent consideration of all the conditions and circumstances of the case as then presented to him, he should come to the conclusion that it is unnecessary to deviate, he cannot properly be *charged with negligence,* even if subsequent events may indicate that a different course than that so determined upon might have been better. If the conditions at the time justified his acts, neither the master nor the shipowners can be properly held liable in damages because, for some reason not at the time apparent, or then to be reasonably anticipated, the expected result does not ensue.

Respectfully submitted,

Milton Andros

Attorney for Petitioners.